IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Norfolk Division)

JTH TAX, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:07-cv-00169-RGD-JEB
	)	
JEROME REED,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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PRELIMINARY STATEMENT

By this motion, Defendant Jerome Reed seeks a dismissal of the Plaintiff's claim or claims on the grounds that the lawsuit fails to meet the jurisdictional requirements of 28 U.S.C. § 1332 (a), which states in part: "**(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, ... "

Plaintiff's lawsuit is for $27,799.94, which does not meet the threshold jurisdictional amount in controversy requirement. Plaintiff was aware that the lawsuit as filed did not meet the jurisdictional requirements of the United States Code at the time of filing, since the amount of damages alleged for royalties and advertising fees at the time of filing was only $10,626.80. The other component of damages alleged was for attorney's fees in order to oppose a separate lawsuit filed in New Jersey, in which an answer, removal motion and motion to transfer were filed, for which Plaintiff was apparently charged $17,173.14 in legal fees by its New Jersey counsel. Filing this action alleging that the amount in controversy would exceed $75,000.00 is not and was not supported by the facts when filed.

STATEMENT OF CASE

JTH Tax, Inc., doing business as Liberty Tax Service, (hereinafter referred to as "Liberty" or "Plaintiff") initiated this lawsuit against Jerome Reed (hereinafter referred to as "Reed" or "Defendant") on or about April 12, 2007 in the United States District Court for the Eastern District of Virginia, Norfolk Division, instead of filing a compulsory counterclaim in a New Jersey case which it successfully sought to have removed to the United States District Court for the District of New Jersey. This matter is now before this Court upon Defendant's Motion to

Dismiss for Lack of Subject Matter Jurisdiction, and Plaintiff's Motion for entry of a default judgment.

ARGUMENT

PLAINTIFF'S CLAIM FAILS TO MEET THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. § 1332(a) AND SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12 (h)(3).

Pursuant to 28 U.S.C. § 1332(a), in order for the Federal Courts to assert jurisdiction, the requirements stated in the statute must be met. One of the chief requirements is that the amount in controversy be $75,000.00 or more exclusive of interest and costs. Where the amount in controversy cannot reasonably be expected to reach this amount, the claim must be dismissed for lack of subject matter jurisdiction. *See* Friedman's, Inc. v. Dunlap, 290 F.3d 191, 195 (4th Cir. 2002) which states, "[t]he district court found that 'the possible award that might reasonably result . . . were the petition granted, will not exceed eight thousand dollars ($8,000).' . . . Thus, the district court held that Friedman's, ABICF and ABLACF 'failed to bring forward competent proof to satisfy their burden that the amount in controversy with regard to Dunlap's claims, which might reasonably be awarded . . . exceeds [$75,000].'" Id. In this case, the Plaintiff knew when the Complaint was filed that that only $10,626.80 was allegedly due from the Defendant, and it had not incurred any substantial legal fees, since no response to the New Jersey lawsuit had been filed. Even after all of the legal pleadings had been filed to transfer venue, the amount of the attorney's fees allegedly incurred, when added to the contract claim, do not even come close to the jurisdictional amount and were equal to 162% of the contract claim itself. The filing of this lawsuit in Federal Court, was apparently not done with the "good faith" required by 28 U.S.C. § 1332(a).

This concept has been stated by Wright Miller & Cooper as "the legal certainty test" which the federal courts have developed. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3702 (1998). When it appears that the amount alleged is insufficient on the face of the Complaint, then the Complaint should be dismissed for lack of jurisdiction. In this case, the Complaint alleges Defendant's actions "causing [caused] Liberty to incur tens if not hundreds of thousands of dollars in legal fees," and never stated a definite amount of claim either for contract or for the legal fees, other than a prayer for judgment in the sum of $150,000.00. (Plaintiff's Complaint, page 5). A naked prayer for relief is not conclusive of the test. Kenebrew v. Connecticut Gen Life Ins. Co., 882 F. Supp. 749, 752 (D.C. Ill. 1995) ("The Court is not bound to accept, however, the mere allegations in the plaintiff's complaint."). Such a Complaint fails to meet the "legal certainty test," especially where it appears that the allegations were inflated. In this case, the contract does not provide for recovery of attorney's fees, and the amounts alleged do not come close to reaching the jurisdictional amount. In fact, the case cited by the Plaintiff in its Motion for Entry of a default judgment as support for a claim of damages for a breach of a forum selection clause, provides for an award of $9,718.52 as incurred legal expenses as an element of damages, not as part of a costs shifting clause as to attorney's fees in the contract, to oppose a Texas lawsuit. JTH Tax, Inc. v. Charon, No. 2:05cv69 (E.D. Va. October 27, 2006).

"Once the propriety of the amount in controversy is challenged, the party seeking to invoke the subject matter jurisdiction of the federal courts has the burden of proving its existence. . . ." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d §

3702 (1998) (citing St. Paul Mercury Indemnity Company v. Red Cab Company, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

In addition, where it appears that there is a subsequent reduction in the amount in controversy, the Court should reexamine whether or not to retain jurisdiction.

> the court must then decide in its discretion whether to retain jurisdiction over the remainder of the case. Here, courts should be guided by the same kind of factors that inform decisions in the supplemental jurisdiction context when the federal basis of a case disappears. In general, courts should weigh convenience and fairness to both parties, as well as the interests of judicial economy. *See In Re Conklin*, 946 F.2d 306, 322 (4th Cir. 1991) (citing *Gibbs*, 383 U.S. at 725, 86 S. Ct. at 1138). In particular, it is important to consider whether the amount claimed in the complaint was made in good faith, or whether plaintiff was consciously relying on flimsy grounds to get into federal court. *See Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S. Ct. 1207, 1213-14, 25 L. Ed. 2d 442 (1970) (distinguishing initial "insubstantiality" from subsequent "mootness")

Shanaghan v. Cahill., 58 F.3d 106, 112 (4th Cir. 1995).

A motion to dismiss for lack of subject matter jurisdiction may be raised at any time. Wright & Miller, Federal Practice & Procedure: Civil 2d § 1393 (1990). In addition, "[w] it appears to a legal certainty that the recoverable damages are less than the jurisdictional amount, the court has the power **and the duty** to dismiss the case." Regency Photo & Video, Inc. v. America Online, Inc., 214 F. Supp. 2d 568, 574 (E.D. Va. 2002) (emphasis supplied).

CONCLUSION

No legal certainty exists for an exercise of subject matter jurisdiction in this case. This case should be dismissed due to a lack of subject matter jurisdiction under 28 U.S.C. § 1332(a) and Fed. R. Civ. P. 12 (h)(3).

JEROME REED

By_________/s/_______________

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2007, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the Following:

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And I hereby certify that I will also fax the document to

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